Perfect Oil Resources (Sabah) Sdn Bhd v Ladang Sri Harapan (Sabah) Sdn Bhd

HIGH COURT (SANDAKAN) — SUIT NO SDK-22NCvC-12/6 OF 2020
CELESTINA STUEL GALID J
29 APRIL 2021

Civil Procedure — Contempt of court — Order of committal — Setting aside leave for order of committal — Whether application to set aside leave for order of committal could not be heard before applicants purged their contempt — Whether there was failure to make full and frank disclosure when making ex parte application for leave for order of committal — Whether leave for order of committal ought to be set aside due to failure to make full and frank disclosure

The court had granted an interim injunction order ('the injunction order') in favour of Perfect Oil Resources (Sabah) Sdn Bhd ('the respondent') against Ladang Sri Harapan (Sabah) Sdn Bhd ('the applicant') from interfering with the respondent's right of unfettered access to use the access road. Subsequently, the court had also allowed the respondent's application for leave for an order of committal against the applicant and its directors for non-compliance of the injunction order ('the leave order'). In the present application, the applicant and its managing director (collectively referred to as 'the applicants') had applied via encl 103 to set aside the leave order. The respondent had raised a preliminary issue that the applicants could not be heard in this application as they had not purged their contempt. The respondent submitted that the applicants had chosen not to comply with the injunction order and as such, they were not entitled to be heard before purging their contempt. In support of encl 103, the applicants submitted that: (a) the respondent had relied on the order by the Assistant Collector of Land Revenue ('the ACLR') dated 18 September 2020 as part of the grounds in the ex parte application for leave and such reliance was tantamount to extending and widening the scope of the injunction order; and (b) the respondent had not made a full and frank disclosure when it made the ex parte application — in relation to this submission, the respondent had failed to exhibit the attachment to exh 9 ie the list of the vehicles and names of the drivers of the vehicles who were to use the access road.

Held, allowing prayers 1, 3 and 4 of encl 103 with costs subject to allocatur:

(1) Although the court had granted the leave order on the basis that there was prima facie case that the applicants were in contempt of the injunction order, there was no finding as yet that they were in fact guilty of contempt. In the light of the decision in *Shamala a/p Sathiyaseelan v Dr*

Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor [2011] 2 MLJ 281, the court exercised its discretion to hear the applicants' setting aside application (see paras 13–14).

(2) The court was bound to and did consider the statement filed by the respondent under O 52 r 3(2) of the Rules of Court 2012. The statement which was filed by the respondent under encl 81 made no reference at all to the order by the ACLR dated 18 September 2020. Thus, it could not be said that there was any reliance by the respondent to the said order (see paras 17 & 19).

(3) The court found that the exclusion of the list from exh 9 was deliberate as, if disclosed, it would have shown that the applicants' objections were premised on the respondent's insistence on the applicants' granting access to those in the said list contrary to the terms of the injunction order which did not specify so. Thus, the applicants could not be said to have flagrantly disobeyed the injunction order. There was merit to the submission by applicants that these exhibits would have had a bearing on the court's conclusion as to whether the applicants were wilfully ignoring the terms of the injunction order. Had this been disclosed, the court could not and certainly would not have concluded that a prima facie contempt had been made out, considering that the threshold was beyond reasonable doubt. The effect of a failure to make full and frank disclosure had been held to result in the setting aside of an ex parte order. As such, based on this ground alone, the court had granted encl 103 (see paras 30 & 33–34).

[Bahasa Malaysia summary

Mahkamah telah memberikan perintah injunksi interim ('perintah injunksi tersebut') yang memihak kepada Perfect Oil Resources (Sabah) Sdn Bhd ('responden') terhadap Ladang Sri Harapan (Sabah) Sdn Bhd ('pemohon') daripada mengganggu hak responden untuk akses tanpa batasan ke atas penggunaan jalan masuk. Setelah itu, mahkamah juga telah membenarkan permohonan responden untuk kebenaran bagi mendapatkan perintah pengkomitan terhadap pemohon dan pengarahnya kerana tidak mematuhi perintah injunksi ('perintah kebenaran tersebut'). Dalam permohonan ini, pemohon dan pengarah urusannya (secara kolektif dirujuk sebagai 'pemohon-pemohon') telah memohon melalui lampiran 103 untuk mengenepikan perintah kebenaran tersebut. Responden telah membangkitkan isu awalan bahawa pemohon-pemohon tidak boleh didengari dalam permohonan ini kerana mereka tidak membersihkan penghinaan yang mereka lakukan. Responden berhujah bahawa pemohon-pemohon telah memilih untuk tidak mematuhi perintah injunksi tersebut dan oleh itu, mereka tidak berhak untuk didengari sebelum membersihkan penghinaan yang mereka lakukan. Bagi menyokong lampiran 103, pemohon-pemohon berhujah bahawa: (a) responden telah bergantung kepada perintah Penolong Pemungut

Hasil Tanah ('ACLR') bertarikh 18 September 2020 sebagai sebahagian daripada alasan dalam permohonan ex parte untuk kebenaran dan pergantungan sedemikian membawa kepada perluasan dan pengembangan skop perintah injunksi tersebut; dan (b) responden tidak membuat pendedahan penuh dan terus terang semasa membuat permohonan ex parte — berhubung dengan hujahan ini, responden telah gagal mengemukakan lampiran kepada eksh 9 iaitu senarai kenderaan-kenderaan dan nama pemandu-pemandu kenderaan yang akan menggunakan jalan masuk tersebut.

Diputuskan, membenarkan permohonan 1, 3 dan 4 dalam lampiran 103 dengan kos tertakluk kepada alokatur:

(1) Walaupun mahkamah telah memberikan perintah kebenaran tersebut atas dasar terdapat kes prima facie bahawa pemohon-pemohon telah menghina perintah injunksi tersebut, masih belum ada dapatan bahawa mereka sebenarnya bersalah atas kesalahan menghina. Mengambil kira keputusan dalam *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor* [2011] 2 MLJ 281, mahkamah menggunakan budi bicaranya untuk mendengar permohonan pemohon-pemohon untuk mengenepikan perintah tersebut (lihat perenggan 13–14).

(2) Mahkamah terikat dan telah mempertimbangkan kenyataan yang difailkan oleh responden di bawah A 52 k 3(2) Kaedah-Kaedah Mahkamah 2012. Kenyataan yang difailkan oleh responden di bawah lampiran 81 tidak merujuk langsung kepada perintah oleh ACLR bertarikh 18 September 2020 tersebut. Oleh itu, tidak boleh dikatakan bahawa terdapat apa-apa pergantungan oleh responden kepada perintah tersebut (lihat perenggan 17 & 19).

(3) Mahkamah mendapati bahawa pengecualian senarai tersebut daripada eksh 9 adalah disengajakan kerana, jika didedahkan, ia akan menunjukkan bahawa bantahan pemohon-pemohon adalah berdasarkan desakan responden supaya pemohon-pemohon memberikan akses kepada mereka yang tersenarai di dalam senarai tersebut bertentangan dengan terma perintah injunksi tersebut yang tidak memperuntukkan sedemikian. Justeru, pemohon-pemohon tidak boleh dikatakan secara terang-terangan mengingkari perintah injunksi tersebut. Terdapat merit kepada hujahan pemohon-pemohon bahawa ekshibit ini akan mempunyai kesan dengan kesimpulan mahkamah sama ada pemohon-pemohon dengan sengaja mengabaikan terma perintah injunksi tersebut. Sekiranya perkara ini didedahkan, mahkamah tidak boleh dan pastinya tidak akan membuat kesimpulan bahawa penghinaan prima facie telah dibuktikan, memandangkan ambang yang perlu dipenuhi adalah melebihi keraguan munasabah. Kesan kegagalan untuk membuat pendedahan penuh dan terus terang telah diputuskan akan

menyebabkan perintah ex parte diketepikan. Oleh yang demikian, berdasarkan alasan ini sahaja, mahkamah telah membenarkan lampiran 103 (lihat perenggan 30 & 33–34).]

Cases referred to

Bakmawar Sdn Bhd v Malayan Banking Bhd [1992] 1 MLJ 67; [1991] 3 CLJ 1759, HC (refd)

Danau Suria Mining Sdn Bhd v YAM Tengku Zaiton Ibni Al Marhum Sultan Abu Bakar [2010] MLJU 1709; [2011] 6 CLJ 774, HC (refd)

Dato' Oon Ah Baa @ Boon Pak Leong & Others v Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Others [2003] MLJU 291; [2003] 7 CLJ 81, HC (refd)

Lim Chau Leng v Wong Chee Chong [2006] 2 MLJ 269; [2006] 1 AMR 151, HC (refd)

Low Swee Siong v Tan Siew Siew and other appeals [2013] 3 MLJ 247; [2013] 5 CLJ 461, CA (refd)

Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor [2011] 2 MLJ 281, FC (refd)

Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458; [2012] 2 CLJ 849, FC (refd)

Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang [2013] 5 MLJ 541, CA (refd)

Thiruchelvasegaram Manickavasegar v Mahadevi Nadchatiram [2005] MLJU 679; [2007] 9 CLJ 784, HC (refd)

Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442; [1995] 3 CLJ 627, SC (refd)

Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217; [1993] 3 CLJ 210, SC (refd)

Legislation referred to

Rules of Court 2012 O 52 r 3(2)

Norbert Yapp (Norbert Yapp & Assoc) for the applicant.
Edwin Tsen (with Caroline Hee) (Tan Pang Tsen & Co) for the respondent.

Celestina Stuel Galid J:

INTRODUCTION

[1] On 4 September 2020, this court had granted the plaintiff the following order ('the injunction order'):

> An interim injunction against the Defendant whether by itself or by its servants and/or agents or howsoever and in whatsoever capacity from interfering with in whatsoever manner, whether by blockage, interference, interruption or other obstruction by whatsoever means, mode or manner or structure, the Plaintiff's right

of unfettered access to use the said access road through CL 085337515, until such time this action is finally disposed of by the court.

[2] By an ex parte notice of application dated 16 December 2020 (encl 80), the plaintiff applied for leave for an order of committal against the defendant (as the second respondent) and a director and the managing director of the defendant, one Lee Yee Wuen (as the first respondent) for non-compliance of the injunction order namely for allegedly refusing to permit the plaintiff unfettered use of the said access road without any reasons or sufficient reasons at all and for allegedly interfering with the plaintiff's use of the said access road.

[3] On 15 January 2021, this court granted the plaintiff's ex parte application ('the leave order').

[4] By encl 103, the defendant and Lee Yee Wuen (collectively referred to as 'the applicants') sought to set aside the leave order. The plaintiff shall be referred to as 'the respondent' in respect of encl 103.

PRELIMINARY ISSUE

[5] The respondent had raised a preliminary issue that the applicants could not be heard in this application as they had not purged their contempt. In support, learned counsel for the respondent cited the Supreme Court case of *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210 which dealt with the same issue.

[6] In that case, the respondents obtained an ex parte interlocutory injunction against the appellants. The respondents claimed that the appellants breached the injunction and obtained leave ex parte to issue proceedings against the appellants to commit them to prison for their contempt. The appellants filed an application to set aside the injunction and when the application came up for hearing the respondents objected contending that the contempt proceedings should be heard first. The trial judge ruled that he would hear the contempt proceedings first and having disposed of it, would then deal with the appellants application to set aside the injunction. The appellants being dissatisfied with the ruling appealed.

[7] In affirming the decision of the High Court, the Supreme Court held as follows:

> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside

A or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

It has not been seriously disputed and indeed we find that it is also an established general rule of law that a party in contempt cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt.

B ...

Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

C In the appeals before us, leave to issue committal proceedings has been granted. This means that the learned High Court judge has accepted that there was a prima facie case for contempt against the appellants. It may well be that on the hearing of the motion proper, the appellants will be acquitted of any charge of contempt. However, for purposes of the present appeals, the allegations of contempt are supported by the order for leave. In *Instituto Bancario San Paolo Di Torina SPA*, there appears to have only been an allegation of contempt without any more. Here, there is a finding of prima facie contempt which cannot be ignored.

[8] Subsequent cases would, however, show that the Supreme Court did not set a rigid position so that all contemnors were bound to purge their contempt before being able to be heard.

[9] This was made clear by Richard Malanjum CJSS (as he then was) in the later Federal Court case of *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor* [2011] 2 MLJ 281 where His Lordship noted as follows:

[25] Learned counsel for the wife submitted that *Wee Choo Keong* case stated the law wrongly when it said that 'there are no exceptions to the general rule' and as such it should not be followed. Learned counsel proffered that the new test is whether 'in the circumstances of an individual case the interests of justice would be best served by hearing the party' who is in contempt.

[26] In view of what was submitted I took the liberty of reading carefully the judgment of the then Supreme Court in *Wee Choo Keong* case.

[27] In that case the appellants (Wee and another) had appealed against the decision of the trial court to hear first the substantive motion of the respondents to commit the appellants to prison for contempt of court alleging that the appellants had breached the ex parte injunction obtained by the respondents earlier on.

[28] In dismissing the appeal the court said this, inter alia, at p 221:

> It has not been seriously disputed and indeed we find that it is also an established general rule of law that a party in contempt cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt. The question which we have to determine in these appeals is the ambit of that general rule.

...

We are unable to accept that any exceptions per se exist to the general rule that a party in contempt cannot be heard until he has purged his contempt. *We are in favour of the views expressed by Denning LJ in Hadkinson v Hadkinson* [1952] 2 All ER 567 *that it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt. This flexible approach to the jurisdiction is based upon a discretion to be exercised in accordance with the circumstances of the case which was accepted by the House of Lords in X Ltd v Morgan-Grampian (Publishers) Ltd and others* [1991] 1 AC 1 ... *The rationale for the rule is public policy*. Orders of court must be treated with respect and require strict obedience.

...

In this regard, we are mindful of the competing public interest in a litigant having a right to be heard. Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

In this context, we are more inclined to accept the view expressed by Young J in *Young v Jackman* (1986) 7 NSWLR 97 where he said: 'Accordingly, it would seem from 1820 onwards that the rule that a person will not be heard when he is guilty of contempt extended as well to the case where a party was considered to be in contempt, that is, where his contempt had prima facie been demonstrated to the court or alternatively when he had confessed the facts which were the subject of a charge of contempt. (Emphasis added.)

[10] His Lordship then concluded his opinion by stating as follows:

[29] *Having therefore carefully considered what was said by the then Supreme Court I do not think the court adopted, as portrayed, a rigid position 'that a person in contempt should not be heard'*. It is obvious from the judgment that in coming to its decision the court was well appraised of the views expressed by the learned judges in *Hadkinson v Hadkinson* [1952] 2 All ER 567.

[30] No doubt the court said that it could not 'accept that any exceptions per se exist to the general rule that a party in contempt cannot be heard until he has purged his contempt'. But that was because it had already taken preference of the view expressed by Denning LJ to that of Romer LJ and Somervell LJ. (Emphasis added.)

[11] In *Low Swee Siong v Tan Siew Siew and other appeals* [2013] 3 MLJ 247; [2013] 5 CLJ 461, the Court of Appeal considered *Wee Choo Keong* in the light of the Federal Court decision in *Shamala* and, inter alia, held:

[57] The decision in *Shamala Sathiyaseelan v Dr Jeyaganesh* is relevant in these proceedings for two other reasons: (a) In that case it was argued that *Wee Choo Keong* was wrongly decided as the Supreme Court had taken a rigid position when saying that a person in contempt could not be heard, but Richard Malanjum CJ (Sabah

A and Sarawak) held, after a careful reading of the judgment in *Wee Choo Keong* that the Supreme Court had not taken a rigid position as alleged, but had in fact preferred the approach that 'it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt'. The learned Chief Judge (Sabah and Sarawak) B further held that the decision in *Wee Choo Keong* was in line with the modern formulation of the discretionary test first propounded by Denning LJ in *Hadkinson v Hadkinson* and later refined in cases such as *Raja v Van Hoogstraten* [2004] EWCA Civ 968.

[58] The other reason was, the Federal Court was well aware that at that stage, there C was no finding as yet that the wife was 'guilty' of contempt (which is not unlike the argument of the father here, that he has not been charged and found guilty of contempt yet) but the Federal Court held that per Arifin Zakaria CJ (Malaya) at p 575, judging from her conduct, since it was apparent that as the wife had no intention of complying with the orders of the court, the court should decline to D proceed with the reference.

[12] It was submitted for the respondent that as with the appellant in *Shamala*, the applicants herein had chosen not to comply with the injunction order and as such, they were not entitled to be heard before purging their E contempt.

[13] Reverting to the present, although the court had granted the leave order on the basis that there was prima facie case that the applicants were in contempt of the injunction order, there was no finding as yet that they were in fact guilty F of contempt — see *Lim Chau Leng v Wong Chee Chong* [2006] 2 MLJ 269; [2006] 1 AMR 151.

[14] Further, this court was aware of the decision by Abdul Wahab Patail J (as he then was) in *Thiruchelvasegaram Manickavasegar v Mahadevi* G *Nadchatiram* [2005] MLJU 679; [2007] 9 CLJ 784 where it was held that although the court granting leave to commence committal proceedings is a prima facie finding of contempt, this would not bar the defendant's application to set aside the leave. His Lordship opined that the costs to be incurred by the defendant to defend the committal proceedings may be avoided if the H application to set aside the leave is successful such as where the court has been misled into granting the leave. This was true to a certain extent on the facts of this case as will be seen later in this judgment. In the light of the decision in *Shamala*, this court exercised its discretion to hear the applicants' setting aside application.

I

MERITS OF THE APPLICATION

[15] One of the grounds relied on by the applicants in this application was that the respondent had purportedly relied on the order by the Assistant

Collector of Land Revenue ('ACLR') dated 18 September 2020 as part of the grounds in the ex parte application for leave where it was stated in the application that:

> ... the grounds of this application are that the first and second Respondents (the Applicants herein) have not complied with the said Order of this Honourable Court dated the 4 September 2020 in High Court Suit No. SDK-22NCvC-12/6-2020 by refusing to allow the Applicant (the Respondents herein) from having an unfettered use of the access road under CL 085337515 stated in the said order and depriving the Applicant from the use of the same for transporting FFB and stones from the Applicant's land under CL 085311146 and *also the order granting a right of way by the ACLR Beluran on 18 September 2020 to allow the Applicant to have a right of way over the second Respondent's land*. (Emphasis added.)

[16] Learned counsel for the applicants submitted that such reliance was tantamount to extending and widening the scope of the injunction order citing the case of *Dato' Oon Ah Baa @ Boon Pak Leong & Others v Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Others* [2003] MLJU 291; [2003] 7 CLJ 81 as support. There, the court opined that the grounds of the plaintiffs' application did not relate to any particular or express terms of the order of the court (alleged to have been disobeyed) apart from merely raising collateral or extraneous matters which are outside of the express terms of the court order.

[17] While it was true that the ex parte leave application made reference to the order by the ACLR dated 18 September 2020, that by itself could not be said to be part of the grounds relied on by the respondent in obtaining the leave order. The court was bound to and did consider the statement filed by the respondent under O 52 r 3(2) of the Rules of Court 2012.

[18] The importance of the statement was highlighted by the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849 when it held as follows:

> [36] The safeguards in r 2(2) entail the application to be supported by a statement describing amongst others, the person sought to be committed and the grounds on which he is alleged to be in contempt. It must be supported by an affidavit verifying the facts relied on in the statement.
>
> [37] *We wish to state in clear term that the alleged act of contempt must be adequately described and particularised in detail in the statement itself*. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. *The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself*. (Emphasis added.)

[19] The statement which was filed by the respondent under encl 81 made no reference at all to the order by the ACLR dated 18 September 2020. Thus, it could not be said that there was any reliance by the respondent to the said order. I therefore failed to see any merit in the applicants' objection on this ground.

[20] Next, the applicants complained that the respondent had not made a full and frank disclosure when it made the ex parte application. In particular, this court's attention was drawn to the correspondences between the parties before the ex parte leave application was filed. It was submitted that had the court been appraised of the actual situation, the court would not have come to a prima facie conclusion that the applicants had committed contempt by refusing to comply with the injunction order.

[21] In particular, the applicants referred to exhs 'LYW4', 'LYW5', 'LYW6' and 'LYW7'. The applicants contended that these documents, had they been disclosed by the respondent would have shown that the applicants were merely ensuring the compliance of the Standard Operating Procedure ('SOP') on the Covid-19 pandemic and that no third parties were allowed to use the road in reliance of the injunction order.

[22] Learned counsel for the respondent conceded that these documents were not exhibited in the ex parte leave application but contended that there were 'sufficient materials' before this court to have come to the prima facie conclusion so that it was justified to grant the leave order.

[23] Respectfully, it was not for the respondent to contend whether the materials it had disclosed to the court amounted to sufficient disclosure. It is for the court to determine so. Further, by nature, an ex parte application necessitates a full and frank disclosure — see *Danau Suria Mining Sdn Bhd v YAM Tengku Zaiton Ibni Al Marhum Sultan Abu Bakar* [2010] MLJU 1709; [2011] 6 CLJ 774.

[24] The court noted that the ex parte leave application was filed on 16 December 2020. In support of the application, the respondent had, amongst others, exhibited the following exchanges of correspondences:

(a) a letter dated 4 December 2020 from the respondent to the second applicant (exh '16');

(b) a letter dated 4 December 2020 from the second applicant to the respondent (exh '15');

(c) a letter dated 4 December 2020 from the respondent to the second applicant (exh '14');

(d) a letter dated 3 December 2020 from the applicants' solicitors to the respondent's solicitors (exh '13'); A

(e) a letter dated 3 December 2020 from the respondent's solicitors to the applicants' solicitors (exh '12');

(f) a letter dated 30 November 2020 from the second applicant to the respondent (exh '11'); and B

(g) a letter dated 29 September 2020 from the respondent to the second applicant (exh '9').

C

[25] The respondent relied on the above exchanges to show that the applicants had refused to allow the respondent access to the said road notwithstanding the injunction order.

D

[26] In exh '9' and in response to the applicants' request, the respondent had provided a list of the vehicles and names of drivers of the vehicles who were to use the access road. However, curiously, the respondent did not exhibit the attachment to exh '9' the said list in the ex parte application.

E

[27] The significance of the failure to exhibit the said list would later become apparent when the applicants exhibited it in the applicants' affidavit is support of encl 103 under exh 'LYW8' as the list included third parties ie contractors and customers of the respondent whose rights to access to the said road were not included in the injunction order.

F

[28] It must be noted that prior to the ex parte application, the respondent had, on 14 October 2020 by encl 51, applied to vary the injunction order as follows:

i) the Injunction granted on 4 September 2020 to the Plaintiff be varied to include:- G

(a) the Plaintiff's agents and or servants and licensees; and

(b) State and Federal agencies and professional consultancy firms to inspect the plantation and quarry operations

H

[29] That application which was opposed by the applicants was dismissed on 21 January 2021. The respondent subsequently and by encl 99, applied to amend its statement of claim to include averments so that third parties may use the access road. It cannot therefore be said that the respondent was not aware that the third parties' right to use of the access road was very much a contentious issue between the respondent and the applicants. I

[30] Bereft of any explanation as to why the respondent would exclude the list from exh '9', this court was constrained to hold that the omission to do so

could hardly be said to be innocent. The omission was deliberate as, if disclosed, it would have shown that the applicants' objections were premised on the respondent's insistence on the applicants' granting access by those in the said list contrary to the terms of the injunction order which did not specify so — see exhs '14' and '15'. Thus, the applicants could not be said to have flagrantly disobeyed the injunction order. There was merit to the submission by learned counsel for the applicants that these exhibits would have had a bearing on the court's conclusion as to whether the applicants were willfully ignoring the terms of the injunction order. Had this been disclosed, the court could not and certainly would not have come to a conclusion that a prima facie contempt had been made out, bearing in mind that the threshold is beyond reasonable doubt.

[31] In *Bakmawar Sdn Bhd v Malayan Banking Bhd* [1992] 1 MLJ 67; [1991] 3 CLJ 1759 Siti Norma Yaakob J (as she then was) had stated:

> It is true that the defendant's letter was exhibited to the plaintiff's ex parte application but it is incumbent upon the plaintiff on an ex parte application of this nature not only to make full disclosures but also to draw attention to all relevant factors so as not to mislead the court into making an order that it would not have necessarily made.

[32] In the case of *Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang* [2013] 5 MLJ 541, the Court of Appeal upheld the setting aside of the ex parte leave for failure to make full and frank disclosure. Abdul Wahab Patail JCA emphasised the importance of setting out all the facts fairly:

> It must also be borne in mind that the application for leave to commence proceedings is made ex parte. To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before it. In an ex parte application, it means the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an inter parte application. If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. There is no reason not to be able to do so for after all only the applicant has the opportunity to be heard upon it in the ex parte application. It certainly does not mean the applicant is entitled to merely state the facts favouring his application and the court must rely on that alone. Otherwise the leave procedure would cease to be a safeguard and instead easily becomes a tool exploited for oppression.

[33] The effect a failure to make full and frank disclosure has been held to result in the setting aside of an ex parte order — see *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627.

[34] Based on this ground alone, this court was inclined to grant the applicants' application under encl 103.

[35] In the light of the court's findings on the above ground, it was unnecessary to deal with the applicants' other ground in this application namely on the courier of cause papers on the applicants.

CONCLUSION

[36] In the circumstances, this court allowed prayers (1), (3) and (4) of encl 103 with costs subject to allocatur. Prayer (2) was rendered academic in view of prayers (1) and (3).

Prayers 1, 3 and 4 of encl 103 allowed with costs subject to allocatur.

Reported by Dzulqarnain Ab Fatar